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A Law Librarian's Guide to Unpublished Judicial Opinions

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Recommended Citation

Joseph L. Gerken, *A Law Librarian's Guide to Unpublished Judicial Opinions*, 96 Law Lib. J. 475 (2004).

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A Librarian's Guide to Unpublished Judicial Opinions*

Joseph L. Gerken**

Mr. Gerken provides readers with an overview of the rules and practice related to the nonpublication of judicial decisions. Using a question-and-answer format, he offers a convenient reference source for librarians to consult when responding to patron inquiries about unpublished opinions. A selective annotated bibliography of articles on the subject is included.

¶1 From the first day of law school, students are inculcated into the mystique of the common law. Law has developed for centuries, incrementally, from case to case. Principles first enunciated in “landmark” cases are elaborated, over time, in subsequent cases, which apply those principles to a range of factual and procedural contexts. In this way, the law develops organically, collaboratively, as a logical and necessary consequence of the adjudication of real-life legal contests.

¶2 Or so we thought. In actuality, an increasingly larger portion of the decisions rendered by our appellate courts are exempted from this case law process. The decisions still adjudicate the rights of the litigants, but they are declared to be nonprecedential. Imagine the happiness of an attorney who comes across a decision that appears to be dispositive of a client's claim—and then the consternation when it turns out the case can't be used because it is an “unpublished” decision.

¶3 There may have been a time when this was a rare phenomenon, but it is becoming more and more common. Currently, about 80% of all federal courts of appeals decisions are deemed “unpublished.”¹ For many years, these opinions constituted a “hidden” literature, and there was little call on reference librarians to answer patrons' inquiries about them. However, several recent developments have brought these decisions much more to the fore.

¶4 Westlaw and LexisNexis have, for a number of years, included unpublished opinions in their federal courts of appeals databases, and attorneys and other researchers have thus had much greater access to the text of these decisions than in the past. Then, in fall 2001, West Publishing introduced the *Federal Appendix*, a new case reporter that printed the full text of “unpublished” opinions, complete with headnotes, topics, and key numbers. At the same time West's digests began including summaries of decisions included in the *Federal Appendix*. Now, for the first time, “unpublished” opinions were readily available to any library patron

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1. ADMIN. OFF. OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 39 tbl. S3 (2002).

familiar with the most fundamental of legal research skills, using a digest to find cases by subject.

¶5 The other significant development was a court decision in which a panel of the Eighth Circuit declared that its own rule on unpublished opinions was unconstitutional.² Predictably, that decision spawned a flurry of judicial decisions, law review articles, and other commentary on the propriety and legality of unpublished opinions.³

¶6 Consequently, librarians are likely to be increasingly confronted with queries about unpublished opinions—about their status in the case law, their use, their rationale, and even their legitimacy. The answers to these questions are not always simple.

¶7 The goal of this article is to provide librarians with an overview of the law and practice surrounding unpublished decisions, and a basis for responding to questions patrons typically ask about them. The article uses a “question-and-answer” format to provide a convenient reference source which librarians can consult in formulating responses to the thornier inquiries. For the most part, the focus is on unpublished opinions in the United States Courts of Appeals, since the issue has received the most attention in that context. However, many of the principles and approaches discussed have applicability in other contexts, for example, in state appellate courts.

¶8 The questions and answers are divided into the following categories: history and context, constitutional challenges, the Supreme Court, depublishing, citing and using unpublished opinions, practical implications, and critiques. It is hoped that the article will engender in at least some readers a fascination with this most remarkable phenomenon in the legal literature. For those who wish to pursue the subject further, a selective annotated bibliography is included in an appendix.

2. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

3. See, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002); R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355 (2001); Recent Case, *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), 114 HARV. L. REV. 940 (2000); Salem M. Katsh & Alex V. Chachkes, *The Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135 (2001); William J. Miller, Note, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument against Rules Prohibiting Citation to Published Judicial Decisions*, 42 B.C. L. REV. 695 (2001); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power and the Constitutionality of "No Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Charles R. Eloschway, Note, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632 (2002); Polly J. Price, *Precedent and Judicial Power after the Founding*, 42 B.C. L. REV. 81 (2000); Lauren K. Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

History and Context

Why Do Courts Issue Unpublished Opinions?

¶9 Although a number of rationales have been advanced for nonpublication of judicial opinions, by far the most common concerns the burgeoning caseload of the courts, especially the federal courts of appeals. Supporters of nonpublication contend that an unpublished opinion requires considerably less time and effort to compose than does a published opinion on the same issues. When a decision is published, the judge must write for a general audience, which means that he or she must fully and accurately lay out all the relevant facts and the procedural background, and must also explicate the court's holdings in significant detail. However, an unpublished opinion has a much more limited audience, namely, the participants in the lawsuit, who are all familiar with the factual and procedural background of the case. Therefore, an unpublished opinion can include a truncated set of facts and often can employ shorthand in addressing the parties' arguments.

¶10 A related justification is that many decisions rendered by an appellate court have little or no precedential value, since they involve issues on which the law is clearly defined. Supporters of nonpublication contend that, by devoting less time to unpublished opinions, the court will have proportionately more time available to write the decisions that "make law."⁴

¶11 A third justification is that there simply would be too much law if all decisions were published. This is by no means a recent concern. Early in the prior century, authors bemoaned the "welter" of decisions, contending it would soon be impossible for an attorney to research all relevant precedent.⁵

When Did Courts Begin Issuing Unpublished Opinions?

¶12 Although judges, attorneys, and commentators had, for years, expressed concern over the volume of reported cases, no formal action was taken by the federal appellate courts until 1964 when the Judicial Conference of the United States, "in view of the rapidly growing number of published opinions," passed a resolution directing federal courts to "authorize the publication of only those opinions which are of general precedential value. . . ."⁶

¶13 This resolution did not result in a significant reduction of reported cases.⁷ However, in 1973, the Advisory Council on Appellate Justice, a group of lawyers,

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4. See generally Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1995); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986); George C. Pratt, *Summary Orders in the Second Circuit under Rule 0.23*, 51 BROOK. L. REV. 479 (1985).
 5. See generally Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472 (1916); John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157 (1915).
 6. JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).
 7. DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 6-7 (1985).

law professors, and judges brought together by the Federal Judicial Center, published a report calling for courts of appeals to adopt criteria for determining which decisions to publish.⁸ Within a year each of the courts had submitted their publication plans to the Judicial Conference; the nonpublication movement had reached a turning point.⁹ By 1981, almost half of all decisions of the courts of appeals were unpublished.¹⁰ Today, approximately 80% of federal appellate decisions are unpublished.¹¹

Which Courts Have Unpublished Opinions?

¶14 All decisions of the U.S. Supreme Court are published. There is no such thing as an unpublished Supreme Court decision. This is not the case with the lower federal courts, although the term unpublished has a very different meaning when applied to district courts than it does when used for courts of appeals.

¶15 Generally, district court decisions are included in the *Federal Supplement* only when they are submitted to its publisher, West, by the deciding judge.¹² In practice, this means that the majority of decisions rendered by district court judges are unpublished, not because there is a rule prohibiting publication, but because the publisher has no access to the decision. Also, some district court decisions submitted to West are deemed not sufficiently significant to put in the print source. Such decisions are put on Westlaw, but they do not find their way into the *Federal Supplement*.¹³ The text of these decisions may also be placed on LexisNexis.

¶16 If a district court decision has not been submitted to West, a person who wanted to obtain a copy of that decision would typically have to request it from the clerk of the rendering court. As a public document, the patron could obtain a copy of the decision, usually at a set fee per page.

¶17 Federal courts of appeals decisions are on a different footing than those of the district courts vis-a-vis publication. Most of the circuits submit all of their decisions—"published" and "unpublished"—to West,¹⁴ which then prints all the published decisions in the *Federal Reporter*. For unpublished decisions, the *Federal Reporter* records only the caption, date of decision, and outcome (i.e., affirmed, reversed, etc.). However, West puts the text of these unpublished decisions in its Westlaw database. These decisions can be searched in the same way that published decisions are searched on Westlaw, by using terms and connectors

8. COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973).

9. STIENSTRA, *supra* note 7, at 7–8.

10. *Id.* at 40 tbl. 2.

11. ADMIN. OFF. OF THE UNITED STATES COURTS, *supra* note 1, at 39 tbl. S–3; David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1137 & n.3 (2002).

12. See ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 50 (8th ed. 2002).

13. See MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 42, 45–46 (9th ed. 1989).

14. At present, only the Eleventh Circuit does not submit its unpublished opinions to West. The Third Circuit submits the text of some, but not all unpublished opinions to West. E-mail from Tim Gamble, Director, Content Operations, West, to the author ¶ 4 (Sept. 10, 2003) (copy on file with author).

or natural language queries. LexisNexis also puts unpublished decisions in its databases, and these decisions are also searchable using terms and connectors or natural language queries.

¶18 Until recently, this has been the overall publication practice for federal court cases. However, the appearance of the *Federal Appendix* has worked a rather dramatic change in the situation. According to West, the *Federal Appendix* will include the full text of unpublished decisions to which the publisher has access. This means decisions of all the courts of appeals except the Eleventh Circuit.¹⁵ These decisions will include West headnotes and topic and key numbers. Also, since the West digests now include case summaries from the *Federal Appendix*, these unpublished opinions can now be found through traditional “book” research methods in the same way that published decisions can be.¹⁶

¶19 The pattern of publication for state courts varies from state to state; however, in many instances, the pattern resembles that in federal courts. In other words, very few trial level decisions are published; the only ones that make their way into reporters are those that are submitted by the deciding judge and are deemed significant enough to publish. A greater proportion of intermediate state court decisions get published, although, for some states, there is not a policy of publishing all such decisions. All of the decisions of the state’s highest court are typically published.

Why Are They Called “Unpublished” Opinions?

¶20 In the early 1970s, when federal courts of appeals began rendering “unpublished” decisions, they were distributed only to the litigants and to the district court from which the decision had been appealed. Thus, in a literal sense, it was anticipated that the decisions would be unpublished. However, almost from the beginning, these decisions tended to find their way into the hands of interested researchers. An institutional litigant that regularly practiced in a particular forum could accumulate a “bank” of decisions. For example, as a named party in labor relations cases, the National Labor Relations Board could accumulate all of the unpublished decisions rendered in its cases, thereby gaining access to those cases at will.¹⁷ Also, as attorneys practicing in a particular area of law became aware of the increasing number of decisions deemed unpublished, they would occasionally pool the decisions in cases on which they had worked.¹⁸

¶21 As legal publishers saw that there was a market for unpublished opinions in particular areas of law, they began publishing the text of such decisions in specialized loose-leaf reporters, newsletters, and other formats. Thus, the term “unpublished”

15. *Id.*, ¶ 2.

16. *Id.*, ¶ 11.

17. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 956–59 (1989).

18. *Id.*; David Ranii, *How the Plaintiffs' Bar Shares Its Information*, NAT'L L.J., July 23, 1984, at 1.

probably was never, strictly speaking, accurate, although one could ascribe at least a truncated meaning to the term (i.e., that the decisions were not included in a West print reporter). With the appearance of the *Federal Appendix*, however, there no longer seems to be any logical basis for deeming these decisions “unpublished.”

How Does a Court Decide Whether to Publish a Decision?

¶22 The answer to this question involves two components: the criteria employed by the court to decide whether to publish a decision, and the method employed in making that decision. The criteria for publication and nonpublication are typically laid out in the rules of the court. By far, the most prevalent criterion is the precedential value of the opinion. A case is selected for nonpublication when it simply reiterates established legal principles. Thus, the First Circuit does not publish opinions that “are likely not to break new legal ground or contribute otherwise to legal development.”¹⁹ The Eighth Circuit provides that an opinion will be unpublished if it “will not have value as precedent.”²⁰

¶23 Some courts set out detailed criteria for determining whether to publish opinions. Thus, in the Fifth Circuit a decision will be published if it meets one of six criteria. An opinion is published if it:

- (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
- (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
- (c) Explains, criticizes, or reviews the history of existing decisional or enacted law;
- (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;
- (e) Concerns or discusses a factual or legal issue of significant public interest; or
- (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.²¹

A Fifth Circuit opinion may also be published if it “[i]s accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.”²² Other circuits apply similar criteria.²³

¶24 On the other hand, some circuits apply only a very general criterion. Thus, the Second Circuit provides for disposition by summary order where “each judge on the panel believes that no jurisdictional purpose would be served by a written opinion.”²⁴ The Eleventh Circuit provides that “[a]n opinion shall be unpublished unless a majority of the panel decides to publish it.”²⁵

19. 1ST CIR. R. 36(a).

20. 8TH CIR. R., App. I ¶ 1.

21. 5TH CIR. R. 47.5.1.

22. *Id.*

23. See 1ST CIR. R. 36(b)(1); 4TH CIR. R. 36(a); 7TH CIR. R. 53(c)(1). 8TH CIR. R., App. I ¶4; 9TH CIR. R. 36-2; D.C. CIR. R. 36(a)(2).

24. 2ND CIR. R. 0.23.

25. 11TH CIR. R. 36-2.

¶25 The decision whether to publish an opinion is typically made early in the process of drafting the opinion. When the decision is made early, the author can tailor the opinion to the expected audience—the general public if it is to be a published decision, or the litigants if it is unpublished. Since the main reason for non-publication is to save time and effort, it would not make sense to wait until later in the process to decide whether to publish the decision.²⁶

¶26 Circuit courts generally employ a screening process that involves assigning weights to cases on appeal.²⁷ “Light-weight” cases are disposed of in short memorandum decisions. Cases involving more significant issues are sent to the panel, where judges decide whether to permit oral argument. “In general . . . a case in which oral argument is not heard is not likely to receive a published opinion.”²⁸ When oral argument is had, a postargument conference is held. At this conference, the judges debate the merits of the parties’ arguments, vote on the outcome, and assign a judge to author the majority opinion. It is most often at this stage that a decision is made as to whether to publish the decision.²⁹ Sometimes, in the course of drafting the opinion, the author will decide that it should be published;³⁰ however, in the vast majority of cases, once a decision as to publication is made, that decision is carried out. The circuits differ with regard to how many judges must request publication. Some circuits provide that a decision will be published only if a majority of the panel agree to publication; others provide for publication so long as one judge on the panel requests publication.³¹

Constitutional Challenges

How Can a Court Say That a Decision Is Not Precedent— Isn't Any Decision, by Definition, Precedential?

¶27 This position has been advanced by a number of authors, including some judges. Thus, Danny Boggs, a judge of the United States Court of Appeals for the Sixth Circuit, and attorney Brian Brooks wrote that “a precedent is a precedent, and no later court can change . . . the fact that a prior case was decided in a particular way. . . .”³²

26. See Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 332–37 (2001); Pratt, *supra* note 4, at 484–86.

27. Wasby, *supra* note 26, at 332.

28. *Id.*

29. *Id.* at 333.

30. Pratt, *supra* note 4, at 486 (“On occasion a decision to dispose of a case by unpublished opinion is later changed, and the substance of the summary order is then repeated in a published opinion.”).

31. See William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 592 tbl. 5 (1981).

32. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2D 17, 23–24 (2000).

¶28 That interpretation is the basis for the holding in *Anastasoff v. United States*,³³ a remarkable decision in which the Eighth Circuit declared its own unpublished opinion rule unconstitutional. In *Anastasoff*, a taxpayer challenged a ruling of the Internal Revenue Service (IRS). In its appellate brief, the IRS cited an unpublished decision that supported its position. The taxpayer argued that, under Eighth Circuit rules, the unpublished decision was not precedent. The court held that the circuit's rule "is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"³⁴ The court reasoned:

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.³⁵

In other words, the doctrine of precedent operates as a limitation on judges' authority to declare the rights of opposing litigants in federal court cases. Judges simply do not have authority, under Article III of the Constitution, to ignore precedent when rendering decisions. Therefore, a rule purporting to free the court from the constraints of precedent is unconstitutional, as exceeding the federal courts' authority under Article III.³⁶

Have Other Courts Adopted the Reasoning of Anastasoff?

¶29 First, it should be noted that the Eighth Circuit subsequently held that its decision in *Anastasoff v. United States* was moot, since the government had acquiesced to the taxpayer's position. The court noted therefore that "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."³⁷

¶30 To date, no other circuit has adopted the holding in *Anastasoff*. However, some district courts have cited *Anastasoff* in support of the proposition that it is proper to acknowledge unpublished opinions. For example, Chief Judge William G. Young of the District of Massachusetts has included language such as the following in footnotes in a number of his opinions: "[f]or the pro-

33. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

34. *Id.* at 899.

35. *Anastasoff*, 223 F.3d at 899–900 (citations omitted).

36. *See id.* at 899–901.

37. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000).

priety of citing and relying on unpublished opinions, see [*Anastasoff*].”³⁸ Judges in other district courts have taken a similar approach.³⁹

¶31 To date, two circuit courts have rejected the reasoning of *Anastasoff*. In *Hart v. Massanari*,⁴⁰ the Ninth Circuit held that its rule according precedential status to only selected decisions was constitutional. *Hart* took issue with the assertion that adherence to precedent was an essential component to judges’ authority at the time the Constitution was adopted. “Far from being the strict and uncontroverted doctrine that *Anastasoff* attempts to portray, the concept of precedent at the time of the Framers was a topic of lively debate.”⁴¹ Judges at that time “looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority.”⁴² Therefore, the Ninth Circuit held that *Anastasoff* erred in holding that adherence to precedent is an inherent component of federal judges’ Article III powers.⁴³ The Federal Circuit has also rejected *Anastasoff*, based on “the comprehensive, scholarly treatment of the issue” in *Hart*.⁴⁴ Numerous law review articles have also discussed the implications of *Anastasoff*.⁴⁵

***Aside from the Issue of Precedent upon Which Anastasoff Was Based,
Are There Other Arguments Against Forbidding Citation of
Unpublished Decisions?***

¶32 Commentators have advanced a number of arguments challenging the constitutionality of *do not cite* rules. There have been two First Amendment theories advanced. The first, based on the Free Speech Clause,⁴⁶ posits that a rule prohibiting litigants from citing or talking about unpublished decisions amounts to a prior restraint on speech.⁴⁷ Under this line of reasoning, the restriction on citation is not

38. *Musto v. Halter*, 135 F. Supp. 2d 220, 238 n.8 (D. Mass. 2001); *see also* *MacNeill Engineering Co., Inc. v. Trisport, Ltd.*, 126 F. Supp. 2d 51, 58 n.3 (D. Mass. 2001); *Mass. Housing Finance Agency*, 255 B.R. 336, 343 n.3 (D. Mass. 2000); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69, 138 n.40 (D. Mass. 2001); *Gonzalez v. United States*, 135 F. Supp. 2d 112, 122 n.10 (D. Mass. 2001); *Suboh v. City of Revere*, 141 F. Supp. 2d 124, 143 n.18 (D. Mass. 2001); *Berthoff v. United States*, 140 F. Supp. 2d 50, 53 n.4 (D. Mass. 2001); *Bechtold v. Massanari*, 152 F. Supp. 2d 1340, 1346 n.6 (D. Mass. 2001); *McGuinness v. Pepe*, 150 F. Supp. 2d 227, 235 n.16 (D. Mass. 2001); *Calvache v. Benov*, 183 F. Supp. 2d 124, 128 n.5 (D. Mass. 2001); *Caron v. United States*, 183 F. Supp. 2d 149, 156 n.7 (D. Mass. 2001); *Owens v. United States*, 236 F. Supp. 2d 122, 130 n.3 (D. Mass. 2002); *Restucci v. Spencer*, 249 F. Supp. 2d 33, 45 n.8 (D. Mass. 2003); *Perkins v. Town of Huntington*, 251 F. Supp. 2d 1143, 1161 n.17 (D. Mass. 2003); *Arevalo v. Ashcroft*, 260 F. Supp. 2d 347, 350 n.4 (D. Mass. 2003).

39. *See* *Scher Enterprises, Inc. v. Bronco Wine Co.*, 178 F. Supp. 2d 780, 788 n.5 (E.D. Mich. 2001); *United States v. Carrillo*, 123 F. Supp. 2d 1223, 1247 n.4 (D. Colo. 2000); *Conant v. City of Hibbing*, 131 F. Supp. 2d 1129, 1135 n.2 (D. Minn. 2000).

40. 266 F.3d 1155 (9th Cir. 2001).

41. *Id.* at 1167 n.20.

42. *Id.* at 1165 (footnote omitted).

43. *Id.* at 1175.

44. *Symbol Technologies, Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

45. *See* sources cited *supra* note 3.

46. “Congress shall make no law . . . abridging the freedom of speech. . . .” U.S. CONST. amend. I.

47. *See* Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1221–35 (2003).

premised on a sufficiently compelling state interest, and therefore it is an unconstitutional infringement of litigants' First Amendment rights.⁴⁸

¶33 The other First Amendment argument is premised on the Petition Clause.⁴⁹ The reasoning is that a brief or oral argument is essentially "speech requesting action from governmental bodies" and should be considered as a type of petition for government redress of a grievance.⁵⁰ According to this argument, "the mere fact that, for example, a district court judge, faced with a situation similar to that discussed in an unpublished opinion, nonetheless acted differently than he would have had he been aware of or chosen to follow the unpublished opinion is a bona fide 'grievance.'"⁵¹

¶34 At least one author⁵² has also argued that *do not cite* rules violate the Due Process Clause.⁵³ This argument is premised on *Honda v. Oberg*, where the Supreme Court held that there was a violation of due process when "a party has been deprived of a well-established common-law protection against arbitrary and inaccurate adjudication."⁵⁴ The theory is that citing a court's prior decisions is also a well-established common law protection against arbitrary adjudication; therefore, it violates due process to prevent counsel from citing to unpublished opinions.⁵⁵

¶35 To date, no circuit court has adopted any of these theories or held that *do not cite* rules are unconstitutional.

The Supreme Court

Has the Supreme Court Ever Addressed the Constitutionality or Propriety of Nonpublication of Opinions?

¶36 The issue of constitutionality was presented to the Court in *Browder v. Director, Department of Corrections*,⁵⁶ where the petitioner contended that "a federal court of appeals lacks the power to withhold any of its opinions from publication and to *a priori* deprive such unpublished opinions of precedential value."⁵⁷ The Chicago Council of Lawyers also submitted an amicus brief, arguing that nonpublication was unconstitutional, based on First Amendment and

48. *Id.* at 1227–30; *see also* Katsh & Chachkes, *supra* note 3, at 300–07 (contending that state's asserted interests in no-citation rules are "weak at best"); Greenwald & Schwarz, *supra* note 11, at 1161–65.

49. "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the government for a redress of grievances. . . ." U.S. CONST. amend. I.

50. Greenwald & Schwarz, *supra* note 11, at 1165.

51. *Id.* at 1166.

52. *See* Wade, *supra* note 3.

53. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

54. 512 U.S. 415, 430 (1994).

55. *See* Wade, *supra* note 3, at 717–30.

56. 434 U.S. 257 (1988).

57. *See* Brief of Petitioner at 50–56, *Browder v. Dir., Dep't of Corrections*, 434 U.S. 257 (1978) (No. 76-5325), available at 1977 WL 189276.

Due Process grounds.⁵⁸ The Court did not decide the issue. Noting the petitioner's challenge to the Seventh Circuit's unpublished opinion rule, the opinion stated, "we leave these questions to another day."⁵⁹

¶37 However, the Court has, at times, been critical of courts of appeals' decisions regarding the publication of opinions. For example, in *United States v. Edge Broadcasting Co.*, it observed: "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion."⁶⁰ Also, in *Taylor v. McKeith*,⁶¹ the Supreme Court reversed a Fifth Circuit decision that had vacated, without opinion, a district court's reapportionment decision. In a footnote, the Court observed that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge."⁶²

¶38 As far as propriety, the Court criticized the apparent lack of care that a circuit court took in rendering an unpublished opinion, noting in *Terrell v. Morris* that "[t]he Sixth Circuit, by its unpublished opinion, affirmed a decision that the District Court never made, and so never reviewed that court's actual decision"⁶³

¶39 Justice Marshall, in particular, was critical of the tendency of courts of appeals to issue very terse unpublished opinions. In a dissent to *County of Los Angeles v. Kling*, he stated:

The Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion. . . . That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.⁶⁴

Is the Supreme Court Less Likely to Grant Certiorari When a Lower Court's Decision Is Unpublished?

¶40 In at least one opinion, the Supreme Court noted that "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."⁶⁵ Thus, the Supreme Court does not, as a policy, deny certiorari simply because the decision of the court of appeals was unpublished.

58. See Brief of Amicus Curiae Chicago Council of Lawyers at 30–58, *Browder* (No. 76-5325), available at 1977 WL 189280.

59. *Browder*, 434 U.S. at 258 n.1.

60. 509 U.S. 418, 425 n.3 (1993).

61. 407 U.S. 191 (1972).

62. *Id.* at 194 n.4.

63. 493 U.S. 1, 3 (1989).

64. 474 U.S. 936, 938 (1985) (Marshall, J., dissenting) (footnote omitted).

65. *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987).

¶41 That being said, a review of the cases considered by the Court in any recent term demonstrates that virtually all of those cases involve a review of published courts of appeals decisions. There are two possible explanations for this. First, the rules of most circuits stipulate that decisions addressing significant legal issues should be published. If the courts adhere to this criterion, one would expect that most cases on which the Court grants certiorari would be published decisions.

¶42 Another possible explanation is that unpublished decisions often are much shorter, including less meticulous reasoning in support of their holdings and a truncated statement of facts. Thus, it may be harder for a petitioner to demonstrate, from the text of an unpublished opinion, that the case involves a question of such significance that the Supreme Court should grant certiorari.

***Can Unpublished Decisions Be Cited in a Petition for Certiorari
to Demonstrate That There Is a Split among the Circuits?***

¶43 The Supreme Court has on occasion cited to unpublished opinions in support of the proposition that the issue before the Court involved a split among the circuits. Thus, in *Johnson v. United States*, the Court granted certiorari to resolve a conflict among the circuits over the applicability of the Ex Post Facto clause of the Constitution to a federal sentencing provision.⁶⁶ In documenting the split among the circuits, the Supreme Court cited an unpublished First Circuit opinion.⁶⁷

¶44 The converse situation has also arisen. The Supreme Court has occasionally granted certiorari to review an unpublished court of appeals decision, citing a split between that decision and the published decisions of other circuits.⁶⁸ There have also been a number of cases in which the Supreme Court has denied certiorari and a dissenting opinion pointed out that the issue involved a split among the circuits, citing to an unpublished opinion.⁶⁹

¶45 These cases, as well as other Supreme Court decisions that discuss or review unpublished courts of appeals decisions, are summarized in an appendix to a very informative article on this subject.⁷⁰

66. 529 U.S. 694, 698–99 & nn. 2–3.

67. *Id.* at 699 n.3 (citing *United States v. Sandoval*, 69 F.3d 531 (1st Cir. 1995) (unpublished table decision)).

68. See *E. Ass'n Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997); *Old Chief v. United States*, 519 U.S. 172 (1997); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452–54 (1993).

69. See *Langston v. United States*, 506 U.S. 930, 931 (1992) (mem.) (White, J., dissenting) (citing *United States v. Handa*, 1991 U.S. App. LEXIS 21752 (9th Cir. 1991) (unpublished decision)); *Costa v. United States*, 506 U.S. 929, 929 (1992) (mem.) (White, J., dissenting) (citing *United States v. Faulkenberry*, 1992 U.S. App. LEXIS 14580 (9th Cir. 1992) (unpublished decision)); *Frierson v. United States*, 1991 U.S. App. LEXIS 10310 (6th Cir. 1991) (unpublished decision)).

70. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 241–50 app. (2001).

Depublication

Is Depublication the Same as Nonpublication?

¶46 Depublication is not the same as nonpublication. Depublication occurs when one court, typically the highest court in a state, orders that an opinion of another court, typically that state's intermediate appellate court, be removed from publication. The practice began in California in the early 1970s. In a typical instance, the California Court of Appeal would issue an opinion and submit the opinion for publication in the *California Reporter*. That opinion would in many cases actually appear in the advance sheets for the reporter. Then a petition seeking review of the Court of Appeal decision would be filed in the California Supreme Court. That court would deny the request for review, but would order that the previously published court of appeal decision be depublished. Hence, that opinion would not appear in the permanent edition of the *California Reporter*.⁷¹

¶47 The practice of depublication has become fairly widespread in California. Over a five-year period ending March 31, 1992, the California Supreme Court depublished 586 opinions of the California Court of Appeal.⁷² During the same five-year period, the California Supreme Court rendered 555 opinions on the merits.⁷³ In other words, the court depublished more opinions than it rendered. Although California was the first state to practice depublication in a systemic way, other states have adopted the practice, notably Arizona⁷⁴ and Hawaii.⁷⁵ Michigan experimented with depublication for about three years, but has abandoned the practice.⁷⁶

What Is the Reason for Depublication?

¶48 A number of rationales have been offered for depublication. As might be expected, the most common explanation is simply that the courts are "overburdened."⁷⁷ Since a depublication order is typically rendered in a case in which the highest court declines to hear the appeal, the court does not consume time reviewing briefs, hearing oral argument, deliberating, or composing a decision on the merits.

¶49 A second rationale relates to the court's mission. The California Supreme Court limits appeals to cases in which the issue has some broad significance. "[T]he

71. See generally Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984).

72. Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?* 26 LOYOLA L.A. L. REV. 1007, 1007 (1993) (reporting data from annual reports of California Judicial Council).

73. *Id.* at 1007-08 (citing 2 JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 13 (1992)).

74. See Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175 (2000).

75. See *id.* at 184.

76. See *id.* at 185.

77. Grodin, *supra* note 71, at 516.

court ought not grant a hearing simply because the court of appeal has written an opinion in which the supreme court disagrees.”⁷⁸ Given this criterion, there are instances in which the supreme court determines that the issues presented do not warrant granting an appeal, even though the lower court decision contains errors of law. Depublication can be utilized to eliminate a precedent that the highest court deems misguided.⁷⁹

What Happens to a Decision Once It Is Depublished?

¶50 Although depublished opinions are not included in the print reporters, they are retained in Westlaw and LexisNexis.⁸⁰ In these databases, the opinion is preceded by a notation indicating that the opinion was depublished. Thus, California cases include the following notation: “[i]n denying review, the Supreme Court ordered that the opinion be not officially published.”⁸¹

¶51 On Westlaw, the decision is given a “red flag,” which is a code used by KeyCite to indicate that the opinion is not good precedent. In Shepard’s online, a “red dot” serves the same function. Researchers using one of these citators to check such an opinion will retrieve an entry that indicates the date on which the opinion was depublished and a warning that the decision is not to be cited as precedent.

¶52 It should be stressed that depublication of an opinion does not negate the substance of the lower court’s decision. That decision still stands as a determination of the rights of the parties. Depublication only means that the decision will not be published in the official reporter and cannot be cited as precedent.⁸² Also, depublication is not, in itself, an indication that the higher court would have reversed the lower court if it had heard the appeal. An opinion could be depublished either because the higher court disagreed with the outcome in the court below, or because it agreed with the outcome but felt that the lower court utilized flawed reasoning in reaching that outcome.⁸³

What Do Commentators Say about Depublication?

¶53 As might be expected, the practice of depublication has been criticized on many of the same grounds raised against nonpublication. Thus, one author con-

78. *Id.* at 518.

79. *Id.* at 518–20.

80. A search on Aug. 13, 2003, using the query “not officially published” in Westlaw’s California Cases database retrieved 1949 cases. A sampling of these decisions indicated that virtually all of them were depublished court of appeal decisions.

81. *See, e.g.,* Estate of Robertson, 126 Cal. Rptr. 238 (Cal. Ct. App. 2002) (ordered not published); In re Dalton, 120 Cal. Rptr. 2d 266 (Cal. Ct. App. 2002) (ordered not published); People v. Hearn, 116 Cal. Rptr. 2d 298 (Cal. Ct. App. 2002) (ordered not published); People v. Vu, 120 Cal. Rptr. 2d 379 (Cal. Ct. App. 2002) (ordered not published); In re Marriage of Monge, 113 Cal. Rptr. 2d 524 (Cal. Ct. App. 2001) (ordered not published); People v. McClellan, 117 Cal. Rptr. 2d 778 (Cal. Ct. App. 2001) (ordered not published); People v. Weise, 105 Cal. Rptr. 2d 314 (Cal. Ct. App. 2001) (ordered not published); People v. Allen, 12 Cal. Rptr. 2d 132 (Cal. Ct. App. 1992) (ordered not published).

82. Berch, *supra* note 74, at 177.

83. Grodin, *supra* note 71, at 519.

tends that depublication enables the state's highest court to "shape the law" by "cast[ing] aside" cases that would otherwise be precedent, "even though it has not heard arguments or deliberated."⁸⁴ Another suggests that depublication has been used in California "to obliterate the opinions emanating from those courts of appeal with a differing judicial philosophy."⁸⁵ The effect of such a practice is to give a "gravely misleading" impression of judicial "harmony" where, in fact, there may be significant differences of opinion with regard to the underlying issues.⁸⁶

¶54 Also, as with an unpublished decision, a litigant can "replicate both the result and reasoning of a depublished opinion, as long as they do so without 'citing' or 'relying on' that opinion."⁸⁷ Hence, there are concerns over litigants getting an unfair advantage because of disparate access to depublished opinions. Also, the practice "injects a good deal of uncertainty in the citation of recent court of appeal opinions as authority because they are still subject to depublication."⁸⁸

Citing and Using Unpublished Opinions

Can an Unpublished Decision Be "Used" or "Cited"?

¶55 This is a deceptively simple question. The answer depends, in part, on the definition of the word *use*. If *use* means cite the decision in a brief to be submitted to a court, it will be necessary to consult the rules of the court that rendered the decision. But if *use* has a broader meaning, there may be ways you can use unpublished cases even when citing them is prohibited.⁸⁹

¶56 As to citing, different courts take different approaches. The District of Columbia Circuit is the only federal circuit court that explicitly provides that an unpublished opinion may be cited as precedent.⁹⁰ Some courts prohibit citing unpublished decisions.⁹¹ Some courts say that unpublished opinions are not precedent, but may be cited as persuasive authority.⁹² The Federal Circuit provides that an unpublished opinion may not be cited as precedent, but the rule is silent on whether such an opinion may be cited as persuasive authority.⁹³

¶57 Some courts say that citation to unpublished decisions is "disfavored."⁹⁴ Some courts say that an unpublished decision can be cited only when there is no

84. Berch, *supra* note 74, at 181.

85. Uelmen, *supra* note 72, at 1020.

86. *Id.*

87. Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 567 (1994).

88. Uelmen, *supra* note 72, at 1011 (citations omitted).

89. *See infra* ¶¶ 72-79.

90. D.C. Cir. R. 28(c)(1)(B). Note that this provision only applies to opinions entered on or after Jan. 1, 2002. Unpublished opinions entered before that date "are not to be cited as precedent." D.C. Cir. R. 28(c)(1)(A).

91. *See, e.g.*, 1ST CIR. R. 36(F); 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv).

92. *See, e.g.*, 5TH CIR. R. 47.5.4; 11TH CIR. R. 36-2.

93. FED. CIR. R. 47.6(b).

94. *See* 6TH CIR. R. 28(g); 10TH CIR. R. 36.3(B). The Eighth Circuit provides that "parties generally should not cite to" unpublished opinions. 8TH CIR. R. 28A(i).

reported case on point.⁹⁵ The Tenth Circuit provides that an unpublished opinion may be cited if it “has persuasive value with respect to a material issue that has not been addressed in a published opinion”⁹⁶ or if “it would assist the court in its disposition.”⁹⁷ However, the opinion is not a binding precedent.⁹⁸

¶58 Some courts define limited circumstances in which an unpublished opinion may be cited. Thus, the Ninth Circuit provides that an unpublished opinion may be cited “in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.”⁹⁹ The Ninth Circuit also provides that an unpublished opinion may be cited “for factual purposes such as to show double jeopardy, sanctionable conduct [or] notice.”¹⁰⁰

¶59 Of course, in addition to the rules of the court, a researcher should also consult case law to see how courts have interpreted those rules.

How Can I Find Out What the Rules of a Particular Court Are Regarding Citation of Unpublished Opinions?

¶60 The best single source for locating court rules regarding unpublished opinions is an article titled “Federal and State Court Rules Governing Publication and Citation of Opinions.”¹⁰¹ It includes an exhaustive listing of the rules of virtually every federal and state court. You may also want to consult an *American Law Reports* annotation covering cases that discuss the precedential effect of unpublished opinions.¹⁰²

Will a Court Reconsider Its Conclusion Not to Publish a Decision?

¶61 The rules of some courts permit a party or, in some cases, a nonparty to request that an unpublished opinion be published. For example, the rules of the First Circuit provide that “[a]ny party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.”¹⁰³ The Seventh Circuit provides that “any person” may request that an unpublished opinion be published. The request must be submitted as a motion and must indicate why the opinion is consistent with the court’s criteria for publication.¹⁰⁴ The Fourth Circuit provides that “counsel may move for publication of an unpublished opin-

95. See 4th Cir. R. 36(c) (unreported decision may be cited “if counsel believes . . . that [it] has precedential value in relation to a material issue in the case and there is no published opinion that would serve as well”); 6TH CIR. R. 23(g); 8TH CIR. R. 28A(i).

96. 10TH CIR. R. 36.3(B)(1).

97. 10TH CIR. R. 36.3(B)(2).

98. 10TH CIR. R. 36.3(A).

99. 9TH CIR. R. 36-3(b)(iii).

100. 9TH CIR. R. 36-3(b)(ii).

101. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

102. Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R. 5th 499 (2003).

103. 1ST CIR. R. 36(b)(2)(D).

104. 7TH CIR. R. 53(d)(3).

ion, citing reasons.”¹⁰⁵ In context, it appears that “counsel” means counsel for one of the parties to the case on which the decision was rendered.¹⁰⁶

¶62 If the court does not have a rule that explicitly provides for requesting that an opinion be published, the court may still entertain such requests. Thus, in such a situation, it may be worth inquiring of the court as to its practice in this regard.

¶63 In requesting that an opinion be published, it is worth consulting the court’s criteria for publication¹⁰⁷ and framing your argument in light of those criteria. For example, if the rule provides that a decision should be published if it “creates or resolves a conflict of authority either within the circuit or between this circuit and another,”¹⁰⁸ you may want to show how such a conflict exists.

If Prohibited from Citing an Unpublished Decision to the Rendering Court, Can It Be Cited to Another Court?

¶64 The rules of some courts include a flat prohibition against citing their unpublished opinions in any forum. For example, the Second Circuit provides that its summary dispositions “shall not be cited or otherwise used before this or any other court.”¹⁰⁹

¶65 The wording of some rules suggests that the prohibition against citing unpublished cases extends only to the rendering court. For example, the First Circuit’s rule provides that “unpublished opinions of this court may be cited in filings with or arguments to this court only in related cases. Otherwise only published opinions may be cited.”¹¹⁰ The rule of the Seventh Circuit states that unpublished opinions “shall not be cited . . . in any federal court within the circuit.”¹¹¹ Thus an unpublished Seventh Circuit decision cannot be cited in district courts within that circuit.

¶66 It is not clear that one court can forbid practitioners from citing its cases in another court. However, there seems to be a spirit of comity, at least in some jurisdictions. Thus, if the Second Circuit says “do not cite this case,” the Seventh Circuit may, as a courtesy to the Second Circuit, also decline to acknowledge the unpublished case as precedent.

In a Jurisdiction That Does Not Prohibit Citing Unpublished Decisions, Is It Worth Doing So?

¶67 Generally, even where a court permits citation of unpublished decisions, it is unlikely to accord the decisions as much precedential value as it would published

105. 4TH CIR. R. 36(b).

106. “Unreported opinions give counsel, the parties and the lower court or agency a statement of reasons for the decision.” *Id.* This suggests that the anticipated audience for such opinions is, in most cases, limited to those individuals.

107. *See supra* ¶¶ 22–24.

108. 5TH CIR. R. 47.5.1(d).

109. 2D CIR. R. 0.23.

110. 1ST CIR. R. 36(b)(2)(F).

111. 7TH CIR. R. 53(b)(2)(iv)(a).

decisions. Thus, in a jurisdiction where its citation is disfavored, a litigant probably will need to explain why an unpublished opinion cited in a brief is worthy of consideration (e.g., noting that there is no published precedent on the issue).

¶68 The rules of some circuits provide that unpublished decisions are not mandatory authority¹¹² or are not considered as precedent.¹¹³ A reasonable reading of such rules is that such decisions may have persuasive value. However, it also is probably a good idea to indicate why you are citing an unpublished rather than a published decision in support of your argument.

¶69 The case law of the court can give you a sense of how the court regards unpublished opinions. Thus, in *Geise v. Pierce Chemical Co.*,¹¹⁴ the district court relied on an unpublished Federal Circuit decision despite that circuit's rule which provided that unpublished decisions could not be cited as precedent. The court reasoned that it used the case "not as precedent but as one would cite a law review article by three respected authors."¹¹⁵

¶70 If you want to get a sense of whether a particular judge uses unpublished opinions, you may be able to retrieve decisions by that judge that cite such opinions. For example, to learn more about how Federal District Judge Blackstone treats unpublished opinions, try this search in Westlaw's federal district court database: **ju(blackstone) & unpublished /s decision opinion disposition**. You can do an equivalent search in LexisNexis' federal courts file.

When Might It Make Sense to Cite an Unpublished Opinion?

¶71 The most common situation would be one in which there are marked similarities in the underlying fact pattern between your case and the unpublished decision. In such an instance, it may be useful to cite a published decision that defines the general principles of law that you are advocating, then use the unpublished decision to show the application of those principles to the particular context.

Is It Possible to Use an Unpublished Decision in a Circuit with a Do Not Cite Rule?

¶72 Again, the answer to this question goes to the meaning of "used." You certainly do not want to cite an unpublished decision in a brief submitted to a court in this circuit. However, the decision may still prove useful to you. The theory behind unpublished opinions is that they reiterate clearly established principles of law. If that really is the case, then an unpublished opinion should be a good source for finding the leading published cases that established the rules of law that bear on your issue.

¶73 It may be that the leading published cases lend themselves to more than one analytical approach. Unpublished decisions may help you to discern which of

112. See, e.g., 10TH CIR. R. 36.3(A)–(B).

113. See, e.g., 8TH CIR. R. 28A(i).

114. 43 F. Supp. 2d 98 (D. Mass. 1999).

115. *Id.* at 103 n.1.

the analyses has met with the best reception in the circuit. Or, there may be certain “buzz words” that the court uses in its unpublished decisions interpreting a supposedly settled legal principle. If so, you may want to phrase your argument accordingly. You do not have to cite to the unpublished decision; you simply use its analysis or its language in constructing your argument.¹¹⁶

¶74 Also, unpublished opinions can give a litigant a sense of how a court applies a particular legal principle. Does the court take a broad interpretation or is the principle subject to various exceptions? Has the court held that the leading published decision is factually distinguished? If so, are there facts that would take your case out of the reach of the established precedent?¹¹⁷

¶75 Finally, unpublished opinions also help attorneys to assess the “odds” with regard to an issue. How often does a particular claim, defense, or argument prevail?¹¹⁸ This information can be of critical importance in making strategic decisions, such as whether to push for settlement or proceed to trial.¹¹⁹

Some Practical Implications

As an Attorney, Can (and Should) I Advise My Client As to the Likely Legal Consequences of Proposed Conduct on the Basis of an Unpublished Decision?

¶76 Researchers use case law for purposes other than as precedent in a brief submitted to a court. A client may ask an attorney for advice on whether a planned course of action will result in liability. Attorneys advise clients based on the legal sources available to them, including, of course, case law. Finding a case on point, attorneys typically can rely on the holding in that case as evidence that the client is, or is not, at risk. However, what if the leading case is an unpublished decision? How useful is the holding in that case as a basis for advising a client?

¶77 To answer this question, the attorney may want to take a look at *Williams v. Dallas Area Rapid Transit*, in which the court ruled that the defendant (DART) was not entitled to raise an immunity defense against a plaintiff's damage claim.¹²⁰ In making this ruling, the court rejected DART's contention that it should adopt the reasoning of a prior unpublished decision.¹²¹ In dissenting to the court's subsequent denial of DART's request for a rehearing, three judges suggested that:

[t]he reader should put himself or herself into the shoes of the attorney for DART. That client is told in May 1999, by a panel of this court . . . that it is immune Competent counsel reasonably would have concluded, and advised his or her client, that it could count

116. Robel, *supra*, note 17, at 950.

117. *Id.*

118. *Id.* at 947.

119. *Id.* at 959.

120. 242 F.3d 315, 322, *reh'g en banc denied*, 256 F.3d 260 (5th Cir. 2001) (per curiam).

121. *Id.* at 318–19 n.1 (rejecting *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (per curiam) (unpublished decision)).

on . . . immunity. Then . . . in the instant case . . . a panel [of this court] . . . reverses and tells DART that . . . it has no such immunity. One can only wonder what competent counsel will advise the client now.¹²²

The *Williams* decision is a graphic example of the perils of relying on unpublished opinions in advising clients as to a course of action.

***What Do You Tell Pro Se Researchers Who Ask Whether They
Can Use an Unpublished Decision to "Support Their Position"?***

¶78 Reference librarians may well find themselves in the predicament of the hypothetical attorney in *Williams*. A patron may point to an unpublished decision and ask, in effect, "Doesn't this mean that I can do such and such?" From a reference librarian's perspective, it is important to explain why this is not necessarily the case. One option is to refer the patron to the dissent in *Williams*.

¶79 Of course, unpublished opinions are not devoid of value to patrons seeking to ascertain their rights. A well-reasoned unpublished opinion will cite to other, published decisions, and those decisions are, of course, reliable precedent (assuming that they have not been overruled). Thus, if a pro se litigant shows a librarian an unpublished decision and asks, "Does this mean A, B, or C?" an appropriate response may be, "No, the decision you are holding in your hand does *not* mean that. However, it cites to another decision that may be a good basis for answering your question."

***Do Attorneys Have to Disclose to Opponents or the Court
an Unpublished Opinion Contrary to Their Position?***

¶80 This is a tricky question. It depends in part on how "technical" one wants to be in interpreting the ethical rules. Most states have a rule requiring attorneys to disclose adverse authority. Thus, the Model Rules of Professional Conduct provide that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . ."¹²³ If the attorney is practicing in a jurisdiction that prohibits citing unpublished opinions, one might reason that there is no duty to disclose an adverse unpublished opinion, since it is not, in the strict sense of the word, authority. On the other hand, a scrupulous individual might construe *authority* broadly to mean a ruling of a court, even though it cannot be cited.

¶81 As a reference librarian, the best approach to this question may be simply to refer the attorney to the relevant rule of conduct and to the court's rules regarding citation of unpublished opinions, and then let the attorney make up his or her own mind as to the proper interpretation.

122. *Williams*, 256 F.3d at 261 (Smith, J., dissenting).

123. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2000).

***Can an Attorney Ethically Ignore an Unpublished Decision That
Supports a Client's Case to Avoid Sanctions for Violating
a Do Not Cite Rule?***

¶82 This is a very interesting conundrum. The ABA's Committee on Ethics and Professional Responsibility has stated:

It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication." On the other hand, there is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban.¹²⁴

An attorney who chooses to follow this interpretation may be "off the hook," regardless of how he may feel about the correctness of that interpretation.

¶83 On the other hand, if an attorney contemplates challenging the court's rules on unpublished opinions, based on *Anastasoff*, or on First Amendment or Due Process grounds, and there is no definitive ruling in the jurisdiction on that issue, the attorney likely would not be sanctioned for raising this good faith argument.¹²⁵ However, once the issue is decided in the jurisdiction, citing to unpublished opinions where that practice is prohibited could lead to sanctions.¹²⁶

Critiques

***Is the Assumption That Judges Can Predict Whether a Decision Is
Going to Have Precedential Value a Valid One?***

¶84 As might be expected, there is a stark difference of opinion on this issue. Some authors assert that judges are quite capable of identifying the decisions that are likely to have precedential value.¹²⁷ Others contend that "courts are putting cases in the wrong piles for the wrong reasons,"¹²⁸ that is, that cases with precedential value often go unpublished.

¶85 To some extent, the answer to this question depends on a subjective judgment, namely, when does a decision have precedential value? There are, however, ways of approaching the question that lead to logical hypotheses. Thus, Songer noted that a significant percentage of unpublished opinions reversed the decision of the district court. He observed that "a reversal should be taken as an objective indicator that at least for the district judge (and presumably for others) the law is

124. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995).

125. See *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) ("[W]e are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality.").

126. See, e.g., *Matter of Bagdade*, 334 F.3d 568, 570 (7th Cir. 2003).

127. See Martin, *supra* note 4, at 191-92.

128. William T. Hangle, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 680 (2002).

in need of clarification.”¹²⁹ Likewise, Hannon noted that a significant number of unpublished decisions include a dissenting or concurring opinion. This suggests that the issue before the court was not as straightforward as might be expected in a decision deemed to have no precedential value.¹³⁰

¶86 If judges were consistently accurate in assessing the precedential value of decision, one would expect little variation in the rates of publication of cases, from judge to judge and circuit to circuit. However, in fact, there is considerable variation in publication rates. For example, over a six-month period, the Eighth Circuit’s publication rate (44.35%) was more than twice that of the Tenth Circuit (20.83%), despite the similar criteria for publication employed by the two circuits.¹³¹ This disparity is even more stark for particular types of cases, such as habeas (57% for the Eighth Circuit, 11% for the Tenth Circuit) and social security (41% for the Eighth Circuit, 7% for the Tenth Circuit.)¹³² Songer noted a “considerable variation among judges (even in the same circuit) in their operational definitions of what constitutes an opinion that is worthy of publication.”¹³³ These differential rates of publication do not, in themselves, indicate that one or the other circuit or judge is making incorrect assessments; they do, however, strongly suggest that predicting the precedential value of a particular opinion may be much more problematic than one would expect.

Are Some Kinds of Cases More (or Less) Likely to Get Published?

¶87 Comparing rates of publication between cases in different substantive areas suggests that some types of cases are much more likely to be considered worthy of publication than others.

Complex civil rights, antitrust and other cases that appeals judges deem important get the same detailed consideration as always. But some judges and legal scholars say that entire classes of appeals deemed routine, such as petitions from prison inmates and individuals’ disability claims under Social Security, get abbreviated attention as staff lawyers sort out cases to recommend for full hearings.¹³⁴

¶88 Since cases that receive full hearings are much more likely to get published than cases in which no hearing is held, the rate of publication for the former cases is correspondingly much higher. The quality of the opinions can also be affected, as decisions in the nonvalued areas tend to be much shorter and are less likely to

129. Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307, 311 (1990).

130. Hannon, *supra* note 70, at 221–22.

131. Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 LAW LIBR. J. 589, 605, 2001 LAW LIBR. J. 28, ¶ 32.

132. *Id.* at 606, ¶ 32 tbl. 3.

133. Songer, *supra* note 129, at 312.

134. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, § 1, at 1.

include any degree of analysis of the claims.¹³⁵ There are a variety of explanations for this phenomenon. Some observers attribute it to the “low status” of certain types of case, or to the fact that “they are the kinds of cases judges find tedious.”¹³⁶ Another interpretation is that judges’ “operational definitions of what constitutes a decision that is worthy of publication” are affected by the status of the appellant.¹³⁷ Thus, appeals brought by “underdog” or “lower status” appellants—prisoners, social security recipients—are much less likely to be deemed significant.¹³⁸

Has Nonpublication Influenced the Development of the Law?

¶89 Studies have focused on two phenomena: the effect of nonpublication on the quality of judicial decisions, and the possibility that certain institutional litigants might be able to “rig” the law over time by influencing courts’ decisions on which cases to publish.

¶90 As early as 1981, Reynolds and Richmond, in an influential article on the subject, observed that “[f]ar and away the major problem we have identified in connection with limited publication is that created by opinions that do not satisfy minimum standards.”¹³⁹ The problem was not simply that unpublished opinions were shorter, or that they included less analysis of the key issues. Such differential treatment was inherent in the two-tiered approach to publication, and there arguably was no need for nonprecedential decisions to address issues in great detail. However, a significant proportion of the unpublished decisions included “no discernable justification” for the outcome; i.e., the reader could not tell why the court reached its conclusion.¹⁴⁰ As one commentator noted, “[n]o lawyer likes to lose a case, but what makes a defeat worse is for a court to fail to explain an adverse ruling”¹⁴¹ Also, there was a concern that “shoddy opinions may reflect the quality of thought that went into the decision itself”¹⁴²

¶91 Another concern relates to the possibility that frequent litigants might “stack the precedential deck” by regularly requesting the court to publish decisions that benefitted their litigation posture.¹⁴³ According to this theory, “[r]epeat litigants will have incentives to move for publication of favorable precedent, whereas one-shot litigants will have neither incentive nor awareness to do so.”¹⁴⁴ Hence, “the common law may be rigged in the aggregate.”¹⁴⁵ Robel adduced statistical

135. *Id.*

136. Robel, *supra* note 17, at 952.

137. Songer, *supra* note 129, at 312.

138. *Id.* at 312–13.

139. Reynolds & Richman, *supra* note 31, at 621.

140. *Id.* at 603.

141. Nathan Dodell, *On Wanting to Know Why*, 2 FED. CIR. B.J. 465, 465 (1992).

142. Reynolds & Richman, *supra* note 31, at 621.

143. Robel, *supra* note 17, at 958.

144. Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1705–06 (1995) (citations omitted).

145. *Id.* at 1705.

support for this theory. She analyzed thirty Seventh Circuit opinions that had been redesignated from unpublished to published over a one-year period. In nineteen of twenty-two cases that involved a government litigant, the opinions favored that litigant. And in all fifteen of the cases involving the federal government, the holdings favored the government.¹⁴⁶ While this is a relatively small data base, the results do suggest that, over time, institutional litigants may be able to “stack” the precedential “deck” by moving to publish favorable opinions.

Whither Unpublished Opinions?

¶92 Following the decision in *Anastasoff v. United States*,¹⁴⁷ some commentators predicted that the practice of declaring that judicial opinions had no precedential value might be challenged in other venues, and that unpublished opinions might become much less prevalent.¹⁴⁸ However, other circuit courts have not adopted the holding of *Anastasoff*, and two have explicitly rejected that holding.¹⁴⁹

¶93 On the other hand, it is possible that courts will revisit their *do not cite* rules. The District of Columbia Circuit has already done so,¹⁵⁰ and the advent of West’s *Federal Appendix* has dramatically reduced the initial impetus for the rule—the perceived inequality of access to unpublished opinions. It is certainly possible that over time courts will be more amenable to citation of unpublished opinions, at least as persuasive authority.

¶94 Perhaps the most significant development on the horizon is the possibility that the Federal Rules of Appellate Procedure will be amended to provide that federal appellate courts may not prohibit or restrict the citation of unpublished judicial opinions. In April 2004, the Advisory Committee on Appellate Rules of the Judicial Conference of the United States approved a proposed new Appellate Rule 32.1 to this effect.¹⁵¹ As of this writing, the proposed rule has only been transmitted “to the Committee on Rules of Practice and Procedure, with a recommendation that it be approved and transmitted to the Judicial Conference for considera-

146. Robel, *supra* note 17, at 958.

147. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

148. See, e.g., Miller, *supra* note 3.

149. See *supra* ¶ 31.

150. D.C. Cir. R. 28(c)(1)(B) (“All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent.”). See Barnett, *supra* note 3, at 3 n.11 (citing Telephone Interviews with D.C. Cir. judges (Jan. 11, 2002, Feb. 28, 2002)) (“Asked why they made the rule change, two D.C. Circuit judges called the move ‘long overdue’ and mentioned variously the *Federal Appendix*, the *Anastasoff* opinion, the broad availability of unpublished opinions through online sources and elsewhere, and that ‘we don’t like secret law.’”).

151. The text of the advisory committee’s proposed new rule is as follows:

Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

FED. R. APP. P. 32.1(a) (proposed). *Proposed Rule on Unpublished Opinions*, LEGAL TIMES, Apr. 12, 2004, at 11.

tion.”¹⁵² Nonetheless, it is likely to be the subject of vigorous debate in the months to come, and its proposal by the advisory committee suggests that, at the least, the subject of unpublished opinions and no-citation rules will remain on the front burner for the foreseeable future.¹⁵³

¶95 If nothing else, the *Federal Appendix* is an indication that West anticipates that unpublished opinions will continue to be rendered in significant numbers, and that there is a viable market—that lawyers and other legal researchers will want to use these opinions, however one chooses to define that term. Given this likelihood, it is reasonable to expect that reference librarians will be called on by patrons to interpret and explain the function of unpublished opinions for the foreseeable future.

Appendix

Selective Annotated Bibliography¹⁵⁴

Binimow, Jason B. “Precedential Effect of Unpublished Opinions.” *American Law Reports* 5th 105 (2003): 499–528.

This post-*Anastasoff* annotation gathers state and federal cases on the issue.

Barnett, Stephen R. “From *Anastasoff* to *Hart* to West’s *Federal Appendix*: The Ground Shifts under No-Citation Rules.” *Journal of Appellate Practice and Process* 4 (2002): 1–26.

Barnett suggests that the availability of unpublished decisions in the *Federal Appendix* eliminates the leading rationale for no-citation rules, namely, that litigants have unequal access to such opinions. He argues that the logic of both *Anastasoff*¹⁵⁵ and *Hart*¹⁵⁶ support citation to unpublished opinions as persuasive authority.

Brown, R. Ben. “Judging in the Days of the Early Republic: A Critique of Judge Arnold’s Use of History in *Anastasoff v. United States*.” *Journal of Appellate Practice and Process* 3 (2001): 355–83.

Brown contends that *Anastasoff* “failed to take into account the historical complexity” (p.356) of judicial decision making in the days of the new republic, particularly with regard to the function of precedent.

Greenwald, David, and Frederick A.O. Schwarz, Jr. “The Censorial Judiciary.” *University of California Davis Law Review* 35 (2002): 1133–74.

152. ADMIN. OFF. OF THE U.S. COURTS, ADVISORY RULES COMMITTEES ACTIONS: SPRING 2004 MEETINGS, at <http://www.uscourts.gov/rules/index.html#advspring04> (last visited May 13, 2004).

153. See Stephen R. Barnett, *No Citation Rules under Seige: A Battlefield Report*, 5 J. APP. PRAC. & PROCESS 473 (2003); Tony Mauro, *Appeals Judges Openly Debate Allowing Citations of All Unpublished Opinions*, N.Y. L.J., Apr. 12, 2004, at 1; Roy H. Wepner, *Are Federal Appellate Practitioners Free at Last? Proposed Rule Change Lifts Ban on Citation of Unpublished Decisions That is Still in Effect in Certain Federal Appeals Courts*, 175 N.J. L.J. 272 (Jan. 26, 2004).

154. Much has been written on unpublished judicial opinions. The items included in this bibliography are some of the more significant sources, including recent post-*Anastasoff* articles, as well as a number of earlier pieces that articulated the discourse on this subject.

155. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

156. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001).

Greenwald and Schwarz argue that no-citation rules violate the First Amendment rights to petition the government for redress of grievances and freedom of speech.

Hangley, William T. "Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions." *Federal Rules Decisions* 208 (2002): 645–91.

This report contends that litigants must be free to cite opinions, although such opinions may be nonbinding. The report also contends that courts are selecting the wrong cases for nonpublication.

Hannon, Michael. "A Closer Look at Unpublished Opinions in the United States Courts of Appeals." *Journal of Appellate Practice and Process* 3 (2001): 199–250.

Hannon found that a significant percentage of unpublished courts of appeals opinions reversed the lower court decision, and that there were a significant number of dissents and concurrences in such opinions. Both findings suggest that unpublished decisions are not merely an iteration of clearly defined law.

Mead, Robert A. "'Unpublished Opinions' as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals." *Law Library Journal* 93 (2001): 589–607.

Based on an examination of publication patterns in the Eighth and Tenth Circuits over a six-month period, Mead concludes that "limited publication rules are likely to leave 'hollow places' in federal case law because they are applied in an inconsistent manner between the circuits" (p.590).

Mills, William R. "The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research." *New York Law School Journal of Human Rights* 19 (2003): 59–76.

Mills suggests that, prior to the advent of Westlaw and LexisNexis, nonpublication was "a phenomenon of only minor significance" (p.70). However, the ready availability of unpublished opinions online transformed the debate. He contends that although nonpublication practice "is ripe for reform," the holding in *Anastasoff* "is ultimately unworkable" since it would impose an almost-impossible burden on conscientious legal researchers (p.75).

Price, Polly J. "Precedent and Judicial Power after the Founding." *Boston College Law Review* 42 (2000): 81–121.

Price posits that "the new non-citation rules that consider some judicial decisions not to be precedent are an aberration in our historic practice" (pp.107–08).

Reynolds, William L., and William M. Richman. "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform" *University of Chicago Law Review* 48 (1981): 573–631.

This is one of the first articles to critique the impact of unpublished opinions on judicial decision making. It disputes the notion that most opinions are nonprecedential, asserting that decisions that apply general legal principles to specific facts also "make law." It notes that the decision whether to publish is often made early in the decision-making process, when it may be difficult to assess the deci-

sion's precedential value. The authors dispute the notion that limited publication enhances productivity, and assert that unpublished opinions "are, as a group, far inferior in quality to [published] opinions" (p.598).

Robel, Lauren K. "The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals." *Michigan Law Review* 87 (1989): 940-62.

Robel's premise is that "differential access to opinions favors certain litigants" (p.946). Government agencies that consistently litigate in a particular forum can accumulate opinions, while a party who litigates infrequently will not have access to them. Even when citation is prohibited, unpublished opinions suggest how courts apply precedents to different fact patterns, guide appellants in framing their arguments, and predict the likely outcome of appeals.

Serfass, Melissa M., and Jessie L. Cranford. "Federal and State Court Rules Governing Publication and Citation of Opinions." *Journal of Appellate Practice and Process* 3 (2001): 251-85.

This is an excellent source for cites to and summaries of rules of individual federal and state courts regarding unpublished opinions.

Stienstra, Donna. *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*. Washington, D.C.: Federal Judicial Center, 1985.

This study analyzes the rules of federal courts of appeals and the courts' practices, noting differences on matters such as the method used to determine whether to publish a decision, and restrictions on citation to unpublished opinions. The study does not take a position on these issues, noting that "any combination of restrictions or freedoms with regard to distribution and citation leads to problems for either the courts or the bar."

Wasby, Stephen L. "Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish." *Journal of Appellate Practice and Process* 3 (2001): 325-41.

Wasby describes the process typically followed by courts of appeals panels in deciding which of their decisions to publish.

